(1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

LISA BLAKE,

Petitioner,

v.

DANIEL ROSERO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the North Carolina Supreme Court violated petitioner's rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution by eliminating, retroactively, the long-standing common law presumption that the mother of an illegitimate child is entitled to custody of her child unless she is an unfit parent or has, by some significant conduct, forfeited her right to the presumption.

2. Whether application of an indeterminate and subjective "best interests" test in awarding custody of a child who has been raised exclusively by one parent violates the parent's and the child's procedural and substantive due process rights under the United States Constitution where the legislature has not established any criteria or guidance for determining what is in a child's "best interests," thus giving no notice of what must be proved by the litigants or of the burden of proof, such that custody is awarded without reference to any objective standards, placement of a child is left to the unfettered discretion of a trial judge, and there can be no meaningful appellate review.

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II. APPLICATION OF THE "BEST INTERESTS" TEST IN MAKING A CHILD CUSTODY DETERMINATION VIOLATED PETITIONER'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND HER CHILD'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE TEST VESTS THE TRIAL JUDGE WITH UNFETTERED DISCRETION, IT PROVIDES NO OBJECTIVE CRITERIA TO THE TRIER OF FACT OR TO THE LITIGANTS REGARDING ISSUES, EVIDENCE, OR BURDEN OF PROOF, AND IT RENDERS APPELLATE REVIEW MEANINGLESS.

THE ISSUE IS OF GREAT NATIONAL IMPORTANCE BECAUSE THERE IS A SUBSTANTIAL AND DAILY RISK OF ADVERSE LIFE-LONG CONSEQUENCES TO MANY CHILDREN (BOTH ILLEGITIMATE AND LEGITIMATE) AND THEIR FAMILIES WITH CUSTODY BEING DECIDED UNDER AN INDETERMINATE, ARBITRARY "BEST INTEREST" TEST 16

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OTHER AUTHORITIES:

Battle Robinson and Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000),* 19 DEL. LAWYER 23 (Summer, 2001) 25

DONALD T. KRAMER, J.D., LEGAL RIGHTS OF CHILDREN § 2.04 (2d ed. 1994) 10, 19

Gary Crippen, *Stumbling Beyond Best Interests of the Child: Re-Examining Child Custody Standard-Setting in the Wake of Minnesota's Four-Year Experiment with the Primary Care Taker Preference,* 75 MINN. L. REV. 427, 499-500 (1990) ... 18, 20

Joan Brannon, ed., NORTH CAROLINA LEGISLATION 1977, *Custody and Support* (N.C. Inst. of Gov't 1977) 10

Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child,* 54 U. CHI. L. REV. 1 (1987) 10, 20

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Katharine T. Bartlett, *Researching Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of a Nuclear Family Has Failed,* 70 VA. L. REV. 879 (1984) 20, 21

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Mary Ann Glendon, *Eason-Weinmann Center for Comparative Law Symposium on Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century: Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986) 18

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OPINIONS BELOW

The opinion of the North Carolina Court of Appeals (App. 26-49) is reported at 357 N.C. 193, 581 S.E.2d 41 (2002), and the opinion of the North Carolina Supreme Court (App. 1-25) is reported at 150 N.C. App. 250, 563 S.E.2d 248 (2003).

STATEMENT OF JURISDICTION

The North Carolina Supreme Court entered final judgment in the matter on July 3, 2003. (App. 50) Petitioner claims that her and her child's rights under the United States Constitution were violated by the North Carolina Supreme Court and asserts jurisdiction in this Court under 28 U.S.C. § 1257. Petitioner requested and, on September 23, 2003, was granted an extension of time to and including October 31, 2003, in which to file this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1: No state shall . . . deprive any person of life, liberty, or property, without due process of law.

N.C. Gen. Stat. § 50-13.2(a): An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of

domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

STATEMENT OF THE CASE

Two days after Kayla Rosero's fourth birthday, her biological father, Daniel Rosero, filed an action for custody in North Carolina. Prior to her birth, he had moved to Oklahoma and remained there because he was not ready to have a child or to be a father when Kayla's mother refused to have an abortion. Petitioner Lisa Blake, who is Kayla's mother, carried Kayla to term without any help or support from Mr. Rosero. She raised Kayla in the same home with her two older sons and with the love and support of her extended family, Kayla's grandmother and great-grandmother. Mr. Rosero never participated in any care, nurturing, or raising of his daughter and never expressed any desire to do so until filing his complaint for custody when Kayla was four years old. He had not wanted to support his child financially and did not do so until about a year and a half after her birth, when he was forced to acknowledge paternity after paternity testing proved a 99.92% likelihood he was Kayla's father. Mr. Rosero then convinced Lisa Blake to accept whatever amount he wanted to pay as support rather than having

any order or enforceable obligation, and he paid less support than the minimum required by the North Carolina guidelines.

Mr. Rosero's contact with his daughter was also less than minimal. It was Lisa Blake who initiated the contact between father and child after paternity was acknowledged. She bought airline tickets and took her young daughter, approximately one and a half years old, to Oklahoma to meet her father. Ms. Blake did this on three occasions. On approximately three occasions thereafter, Mr. Rosero asked for and had Kayla with him for one to two week periods before he filed his complaint for custody. Three months before the hearing, when Kayla was almost five years old, Mr. Rosero and his wife moved to North Carolina and then saw Kayla on approximately eight weekends.

During the almost five years of Kayla's life before the hearing, Lisa Blake had maintained the same home and same job in a hospital operating room while Mr. Rosero moved at least seven to eight times and had as many jobs. Under Ms. Blake's care, Kayla developed into a happy, bright, beautiful, well-adjusted, inquisitive child who was ready and prepared to enter school in the fall. At trial in December, 2000, the judge applied the "best interest" test, found both parties "fit and proper" parents, but awarded primary custody to Mr. Rosero without any apparent recognition or consideration of the facts – that only one party had assumed parental responsibility during Kayla's entire life, that Mr. Rosero had never legitimated his child or lived with her or participated in any way in her upbringing – and without considering the significant impact on Kayla of removing her from the only family and home she had ever known.

The North Carolina Court of Appeals majority reversed, acknowledging the trial court had applied the wrong standard and should have applied the common law presumption, which would have resulted in custody to Petitioner. One judge dissented, expressing his belief that the presumption had been abrogated by many changes in the law affecting, for example, intestacy, paternity, adoption consent, and others. He found, however, that the trial court's order was seriously deficient under the best interest standard because it was not supported by the evidence at trial, made unsupported findings and conclusions (many without any relevance to the child's welfare) and failed to address important issues or to make needed and relevant findings. The North Carolina Supreme Court reversed, declaring the long-standing common law presumption no longer exists.

REASONS FOR GRANTING THE PETITION

I. THE NORTH CAROLINA SUPREME COURT DEPRIVED PETITIONER OF HER RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN, WITHOUT NOTICE AND CONTRARY TO WELL SETTLED LAW, IT ABOLISHED THE MORE THAN TWO HUNDRED YEAR OLD COMMON LAW PRESUMPTION THAT THE MOTHER OF A CHILD BORN OUT OF WEDLOCK IS ENTITLED TO CUSTODY OF HER CHILD UNLESS SHE IS NOT FIT AND WHEN IT HELD THAT CUSTODY OF PETITIONER'S MINOR CHILD SHOULD BE DETERMINED ACCORDING TO THE "BEST INTERESTS" TEST.

The common law presumption providing that custody of an illegitimate child belongs with his or her mother unless she is unfit is clear, long-standing, and well established law in North Carolina. It was last enunciated in 1965:

> "It is well settled law in this State, and it seems to be universally so held, that the mother of an illegitimate child is its natural guardian, and, as such, has the legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child," *Browning v. Humphrey,* 241 N.C. 285, 287, 84 S.E. 2d 917, 918; *accord, Wall v. Hardee,* 240 N.C. 465, 82 S.E. 2d 370; *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *In re McGraw,* 228 N.C. 46, 44 S.E. 2d 349; *In re Foster,* 209 N.C. 489, 183 S.E. 744; *In re Shelton,* 203 N.C. 75, 164 S.E. 332; *In re Jones,* 153 N.C. 312, 69 S.E. 217; 10 Am. Jur. 2d, Bastards § 60

(1963); 3 Lee, North Carolina Family Law § 224 (3d Ed. 1963).

"At common law the right to the custody of legitimate children was generally held to be in the father, but as to illegitimate children the rule was different. As between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior, and the father's right, if any such exists, is secondary." Annot., Right of mother to custody of illegitimate child, 98 A.L.R. 2d 417, 431, citing cases from 20 jurisdictions, including North Carolina.

As against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody.

. . . .

In the face of all this, it would be anomalous indeed if the law should sanction an award of custody to the putative father when there is a specific finding that the mother "is now of good character and reputation and is a fit and suitable person to have the custody of minor children and is a fit and proper person to have custody of the said James William Piercy (sometimes known as James William Queen)." On this finding establishing her fitness, and the additional finding establishing that of her husband, the award of custody to the putative father, Queen, cannot be sustained.

Jolly v. Queen, 264 N.C. 711, 713-715, 142 S.E.2d 592, 595-596 (1965).

The presumption derives from common law., *id.*, which, in North Carolina, "is the common law of England as it existed when North Carolina became a sovereign State in 1776. *Bruton, Attorney General v. Enterprises, Inc.*, 273 N.C. 399, 417, 160 S.E. 2d 482, 494 (1968). *See* N.C.G.S. § 4-1 (1986)." *Hall v. Post*, 323 N.C. 259, 264, 372 S.E.2d 711, 714 (1988). The common law "to be applied in North Carolina 'is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete.' *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679." *Conley v. Emerald Isle Realty, Inc.*, 350 N.C. 293, 296, 513 S.E.2d 556, 559 (1999). The presumption at issue has always been the law of North Carolina, *e.g., Jolly v. Queen*, and appears to continue to be the law in eighteen to twenty other states, eleven of which have codified the presumption in some form. *See* ARIZ. REV. STAT. ANN. § 13-1302(B); ARK. CODE ANN. § 9-10-113(a); FLA. STAT. ANN. § 744.301(1); GA. CODE ANN. § 19-7-25; IND. CODE § 31-14-12-1; MD. ANN. CODE art. 93 § 1-208; MASS. GEN. L. ch. 209C § 10; MINN. STAT. § 257.541; OKLA. STAT. ANN. tit. 10 § 6; S.C. CODE ANN. § 20-7-953B; TENN. CODE ANN. § 36-2-303; VT. STAT. ANN. tit. 14; WIS. STAT. § 48.435; *B.E.B. v. H.M., 822 So.2d 429* (Ala., 2001) (holding father's acknowledgment of paternity does not nullify the presumption); *Pi v. Delta*, 175 Conn. 527, 400 A.2d 709 (1978); *Race v. Sullivan*, 612 So.2d 660 (Fla. App. 1993); *Nelson v. Standefer*, 87 Idaho 83, 390 P.2d 838 (1964); *State ex rel. Grape v. Zach*, 524 N.W.2d 788 (Neb. 1994); *In re Hope*, 34 A. 994 (R.I. 1896); *Chandler v. Matthews*,

734 P.2d 907 (Utah 1987); *Taylor v. Commonwealth*, 260 Va. 683, 537 S.E.2d 592 (2000); *In re S.B.L.*, 553 A.2d 1078 (Vt. 1988).

In North Carolina, the common law ***is*** the law unless and until it is abrogated or repealed by the legislature. N.C. GEN. STAT. § 4-1. When legislation abrogates or modifies the common law, it must do so clearly and unambiguously, because:

> "It is a rule generally observed (except where prohibited by statute) that acts of the Legislature made in derogation of the common law will not be extended by construction; that is, the Legislature will not be presumed to intend innovations upon the common law, and its *enactments will not be extended, in directions contrary to the common law, further than is indicated by the express terms of the law, or by fair and reasonable implications from its nature or purpose or the language employed.*" . . . "[T]he common law in regard to a particular matter is presumed to be in force until it affirmatively appears that it has been abrogated or modified by statute. Therefore, . . . all statutes in derogation of the common law are to be construed strictly. *Where the statute not only effects a change in the common law, but is also in derogation of common right, it must be construed with especial strictness.* Examples of such statutes are those which operate in restraint of personal liberty or civil rights, or . . . which grant power to deprive persons of the ownership of property without their consent; . . . which disturb vested rights in property or contracts; or which restrain the freedom of contract, the exercise of any trade or occupation, or the conduct of business. The rule to be applied in the construction of all such statutes is that *they must*

> *not be deemed to extinguish or restrain private rights, unless it appears by express words or plain implication that it was the intention of the Legislature to do so.*"

Price v. Edwards, 178 N.C. 493, 500, 101 S.E. 33, 36-37 (1919) (citations omitted) (emphasis added). It is, therefore, the province of the General Assembly, not the courts, to make policy and change the common law. *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956); *accord, State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000) (relying upon *Price*).

The North Carolina Supreme Court's opinion, while appearing to interpret North Carolina's custody statute, in fact dramatically changes the law by "interpreting" one sentence contrary to its express language and legislative intent, thereby obliterating the more than two hundred year old common law presumption at issue. The Supreme Court opinion declares that the 1977 addition of one sentence to the custody statute abrogated the long-standing common law presumption. (*See* App. 21-22) The sentence added to the custody statute is: "Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child." N.C. GEN. STAT. § 50-13.2(a). In so holding, the state court created new law by declaring a modification made twenty-six years ago has now abrogated the more than two hundred and twenty-five year old common law. This conclusion was both erroneous and unwarranted, and was certainly not intended by the General Assembly.

The 1977 legislation was part of a national move to repeal the "tender years doctrine" which had developed in response to the indeterminate best interests rule adopted

by most, if not all, states during the nineteenth and early twentieth centuries. *See* DONALD T. KRAMER, J.D., LEGAL RIGHTS OF CHILDREN § 2.04 (2d ed. 1994). The tender years doctrine, although used somewhat like a presumption in that mothers were generally given custody of young children unless unfit, was never a part of the common law but was instead a judicially created doctrine that vitiated against the arbitrary effects of the vague, undefined "best interests" test for custody. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child,* 54 U. CHI. L. REV. 1 (1987).

The North Carolina legislature enacted the 1977 modification to N.C. GEN. STAT. 50-13.2(a) in direct response to the state Supreme Court's strong approval of the tender years doctrine in *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973). *See* Joan Brannon, ed., NORTH CAROLINA LEGISLATION 1977, *Custody and Support* 277-278 (N.C. Inst. of Gov't 1977). The North Carolina Court of Appeals believed the legislation eliminated the tender years doctrine. *See Westneat v. Westneat*, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

More important, the language of the modification itself clearly does not abrogate or effect the presumption in any way because the trier of fact does not even reach the issue of "best interests" unless and until the unwed mother is proven unfit or otherwise has forfeited her right to custody. If, and only if, the mother is shown to be unfit, does the trier of fact even address or employ the best interest test. *E.g., Jolly, supra*. If and when the presumption is overcome, the trial court may employ the best interests analysis, but only then, after the presumption has been overcome, does the best interest test apply. At that time, in applying the best interest test, the 1977

amendment comes into effect, and the court must determine which parent "will better promote" the child's welfare without any presumption based upon gender. N.C. GEN. STAT. § 50-13.2(a).

The North Carolina Supreme Court either disregarded or did not recognize that the best interest test, and thus the addition to § 50-13.2(a), does not even come into play unless and until the presumption has been overcome; it did not address the fact in its opinion.[1] The *Jolly* court, however (even before the modification), recognized that the best interest test *cannot be applied* to custody of an illegitimate child when the mother is a fit person. The modification in no way changes or alters this requirement. The North Carolina Supreme Court's interpretation of the modification overlooks the meaning of the presumption, the language of the modification itself, and the basic rules of statutory construction which specifically require reviewing courts to construe with particular strictness any legislation in abrogation of the common law. *See Price v. Edwards, supra*. Furthermore, the court's interpretation clearly extinguishes a significant right of the mother and of the illegitimate child by eliminating entirely the common law presumption of custody.

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[1] In addition, although the legislative history is sparse and confusing, it appears the legislature specifically considered abolishing all common law custody presumptions, including the presumption at issue and the presumption favoring a natural parent as against a third party, but decided in favor of retaining them. *See* Senate Judiciary II Committee Minutes, May 26, 1977. The North Carolina Supreme Court opinion did not address legislative intent.

There is no reason to interpret the statute as the North Carolina Supreme Court has done. "The primary goal of statutory construction is to 'ensure that the purpose of the legislature is accomplished. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.'" *In re Investigation of the Death of Miller*, 357 N.C. 316, 324, 584 S.E.2d 772, 780 (2003) (citations omitted). "Words and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.'" *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 272, 280 (1970) (citations omitted). There is no ambiguity in the 1977 modification. There is no ambiguity in the common law presumption. Each is easily applied without compromise to the other. The 1977 modification does not in any way alter, much less abrogate, the common law presumption, yet the Supreme Court, under the guise of statutory interpretation, abolished this long-standing law, changed the public policy of the state, drastically curtailed the legal protection afforded mothers of illegitimate children, and deprived Petitioner of her constitutional protections to both substantive and procedural due process under the United States Constitution. *See* U.S. CONST. Amend. XIV.

Contrary to the North Carolina Supreme Court's suggestion, changes in other statutes do not support its contention that the 1977 modification to § 50-13.2 abrogated the presumption. Indeed, the paternity statutes, which were enacted after *Jolly v. Queen*, undermine the

suggestion that paternity and legitimation have, or should have, the same legal consequences for fathers. The paternity statutes were enacted to provide a civil means for mothers and governmental agencies to force recalcitrant fathers to support their children. Paternity actions can only be brought by those seeking support, not by fathers. *See* N.C. GEN. STAT. § 49-14 (App. 53-55); *accord*, *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E.2d 18 (1949) (before § 49-14, illegitimate child had no right to sue father for support); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976) (paternity statute permits mother or agency to sue father for child support once paternity is established). These statutes were not intended to benefit, and do not benefit, the fathers who are being sued, and no one's legal relationship is changed. Importantly, the paternity statute itself specifically states: "The establishment of paternity shall not have the effect of legitimation." N.C. GEN. STAT. § 49-14.[2]

Legitimation, on the other hand, changes both the child's and the father's legal status. N.C. GEN. STAT. § 49-11. (App. 52) Legitimation can only be accomplished by action taken by the father – either by marriage to the mother or, without marriage, by a simple proceeding before the clerk of court. N.C. GEN. STAT. §§ 49-10, 49-12. (App. 51, 52-53) In addition to providing a child with all

[2] The language in N.C. GEN. STAT. § 49-15 (App. 55) created at the same time as § 49-14, merely abrogated the common law which did not allow illegitimate children to seek support from their fathers in a civil action and did not allow standing for fathers of illegitimate children to bring actions for custody or visitation. To interpret the provision otherwise would render meaningless both the specific mandate in § 49-14 as well as the 1977 modification to § 50-13.2(a).

the legal protections of a child born in marriage, legitimation is a public acknowledgment by the father that he is and intends to be the father of his child. Thus, legitimation results from a father's affirmative act while paternity determinations, on the other hand, result precisely because a father has failed to act. Changes in the paternity statutes, as well as in intestacy and adoption statutes, did not and could not abrogate the presumption at issue. They do not deal with the custody of illegitimate children.

The North Carolina Supreme Court opinion also cites *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955) and *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974) as support for abrogation of the common law presumption favoring mothers of illegitimate children. (*See* App. 11-12) Neither case does so. The Court of Appeals case addressed a visitation contempt order, and the Supreme Court case addressed standing of an unwed father under our broad statute permitting "any person" with an interest to bring a custody suit. Neither addressed the presumption at issue.

Because the legislature did not abrogate or modify the common law presumption granting custody to mothers of illegitimate children, Petitioner had every right to rely upon this well established law. She was a fit and proper parent and was found to be such, she had provided a stable home environment and had cared for her daughter and two sons for years while respondent did virtually nothing to help raise Kayla. To change the law, and thus change the custody standard entirely, by judicial fiat, without notice and without justification, deprived Petitioner of both procedural and substantive due process under the United States Constitution. *See* U.S. CONST.

amend. XIV. Petitioner's custodial rights were eliminated retroactively, after her trial.

This Court has recognized that the Fourteenth Amendment to the United States Constitution protects the right of a parent "to establish a home and bring up children [and is] perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citations omitted). A liberty interest, in order to be fundamental, must also be one that is "traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). The Fourteenth Amendment to the United States Constitution also guarantees the right to procedural due process, and the process to which one is due depends upon the interest at stake. *Smith v. Organization of Human Resources Admin.*, 431 U.S. 816 (1977). Because the liberty interest at stake in the instant case is so traditional and so fundamental, it warrants "heightened protection against government interference." *Troxel* at 65.

Petitioner's right to rely upon well established law, her right to custody of her child, and her right to maintain her family intact are interests long recognized by this Court, albeit in contexts other than the one raised in her case. *See e.g., Michael H, supra; Troxel, supra; Meyer v. Nebraska*, 262 U.S. 390 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). Unlike the adoption or termination cases this Court has reviewed, the child in the instant case was removed from her legitimate and biological parent – the only parent who had raised her – without any finding the parent was unfit or had in any way done anything even remotely harmful or potentially harmful to the child. If the right to bear children is truly fundamental, then the common law presumption of custody of an illegitimate child to her mother unless unfit must surely be equally

fundamental and traditional. The presumption has existed for centuries and continues in many states today, thus attesting to its viability and its importance. The retroactive eradication of this long-standing common law by the North Carolina Supreme Court, without legislation and contrary to legal authority, deprived Petitioner of her right to both procedural and substantive due process under the Fourteenth Amendment to the United States Constitution.

II. APPLICATION OF THE "BEST INTERESTS" TEST IN MAKING A CHILD CUSTODY DETERMINATION VIOLATED PETITIONER'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND HER CHILD'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE TEST VESTS THE TRIAL JUDGE WITH UNFETTERED DISCRETION, IT PROVIDES NO OBJECTIVE CRITERIA TO THE TRIER OF FACT OR TO THE LITIGANTS REGARDING ISSUES, EVIDENCE, OR BURDEN OF PROOF, AND IT RENDERS APPELLATE REVIEW MEANINGLESS.

THE ISSUE IS OF GREAT NATIONAL IMPORTANCE BECAUSE THERE IS A SUBSTANTIAL AND DAILY RISK OF ADVERSE LIFE-LONG CONSEQUENCES TO MANY CHILDREN (BOTH ILLEGITIMATE AND LEGITIMATE) AND THEIR FAMILIES WITH CUSTODY BEING DECIDED UNDER AN INDETERMINATE, ARBITRARY "BEST INTEREST" TEST.

"The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property,

without due process of law.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It has long been recognized that the Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than just "fair process."

> Fairness of procedure is "due process in the primary sense." . . . One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard. . . . " "By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." . . . "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 160-162 (1951) (citations omitted). "The hearing, moreover, must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Fundamental fairness thus requires sufficient notice to litigants not only that there will be a trial but also notice of what is at issue so the parties can prepare and meet whatever allegations and burdens are involved, especially when the consequences are so important.

Although this Court has not addressed the liberty interest of children in maintaining their family relationships, it has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." 530 U.S. at 66 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Petitioner urges this Court to address the issue because many children, both legitimate and illegitimate, are being arbitrarily affected daily in trial courts across the nation by use of this indeterminate test, which is open to unjust, injurious, irrational decisions. While sounding laudable, "best interest" leaves judges and litigants dissatisfied and produces harmful affects on children who are usually not even represented or heard. *See e.g.*, Mary Ann Glendon, *Eason-Weinmann Center for Comparative Law Symposium on Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century: Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1168-69 (1986); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Re-Examining Child Custody Standard-Setting in the Wake of Minnesota's Four-Year Experiment with the Primary Care Taker Preference,* 75 MINN. L. REV. 427, 499-500 (1990).

Petitioner did not initiate the lawsuit. She was forced into court by Respondent's claim for custody in a complaint alleging nothing more than the bare conclusion that her child's best interests would be served by an award of custody to Respondent. There was no claim Petitioner was unfit or had not adequately provided for Kayla. There was no notice of what acts or conditions Respondent believed bore on his daughters best interest. At trial, the judge found Petitioner to be a "fit and proper" parent but, in the name of "best interest," awarded primary custody to

Respondent, thereby completely disrupting Kayla's life, with potentially life-long detrimental effects.

"The best interests of the child rule, which is currently the guiding legal principle in custody disputes, had its genesis in the late nineteenth and early twentieth centuries." DONALD T. KRAMER, J.D., LEGAL RIGHTS OF CHILDREN § 2.04 (2d ed. 1994).[3] Being indeterminate and without definition, "best interests" provides no notice of what is at issue, what must be proved, or what conduct litigants might choose in order to avoid litigation.

> Courts, lawyers, parents, and the public at large bandy about the phrase "best interests of the child" as though this standard were meaningful or jurisprudentially sound. It is neither. Instead, the standard is a political construct, as virtually anyone thinking about it soon concludes. As such, the "best interests" standard fails to address the interests of any real, individual child or even of children *en masse*. Rather, the standard implements adult agendas, in part by ensuring that courts fail to examine the interests of the real, individual children whose custody is disputed.

Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law,* 36 ARIZ. L. REV. 11, 53 (1994). Many have commented on the risks and inadequacies inherent in using so broad and undefined a

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[3] Despite frequent reference to the best interest rule as a standard, many authors choose not to designate it as such precisely because it lacks any indicia of being a standard. *E.g.*, Martha Fineman, *Dominant Discourse, Professional Language, and Illegal Change in Child Custody Decision Making,* 101 HARV. L. REV. 727, 770-771 (1988).

concept for such an important judicial function, from the judge's perspective, the litigants', and the child's. *See, e.g.*, MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 146 (1994); JOSEPH GOLDSTEIN, ET AL., THE BEST INTERESTS OF THE CHILD, THE LEAST DETRIMENTAL ALTERNATIVE (1996); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE, PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW (1995); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child,* 54 U. CHI. L. REV. 1 (1987); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference,* 75 MINN. L. REV. 427 (1990); Katharine T. Bartlett, *Researching Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of a Nuclear Family Has Failed,* 70 VA. L. REV. 879 (1984). All conclude the test is a failure. Judge Crippen, who was an appellate judge at the time of his article and had also been a trial judge for many years, evaluated use of the primary caretaker rule in Minnesota and concluded in 1990:

> For opponents of the [primary caretaker] preference, integrity demands recognition of the rationale for the standard. They must face criticism of the broad best interests standard, which risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law. The costs of this system, especially for children, mothers and those with the least resources to resist threats of litigation, are readily apparent.

Crippen, *supra* at 258-259.

Problems with the rule are numerous. There are no standards because there is almost no consensus on the subject. The world is changing and many of the custody cases are no longer between two divorcing parents. The lack of guidelines leads to more litigation and fosters irrational and arbitrary results. *See e.g.*, JOSEPH GOLDSTEIN, ET AL., THE BEST INTERESTS OF THE CHILD, THE LEAST DETRIMENTAL ALTERNATIVE (1996). Commentators and child development experts, much less judges, reach little consensus about what is best – or even what is "good" – for children in the context of divorce (which at least involves two parents who have lived with their child). *Id.* at 225. On a few situations, there is consensus. For example, even in the divorce context, the "scales used to weigh a child's best interests are not evenly balanced between two parents when one is an occasional and the other a constant presence . . . [therefore] prima facie, one is demonstrably more beneficial than the other." *Id.* at 37. Removing a child from those who have cared for her and with whom she is attached will likely have life-long adverse consequences. *E.g.*, Katharine T. Bartlett, *Researching Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of a Nuclear Family Has Failed,* 70 VA. L. REV. 879, 902 (1984). These consequences, however, can be ignored under the best interest test unless there are articulated factors a court is required to consider.

Without such factors, the best interest standard has been likened to a coin toss, certainly not good jurisprudence or what anyone would want in a judicial system. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 290 (1975). But that is frequently how the system is viewed and how it often functions in custody cases. Different outcomes are likely with different judges

because personal biases and values (whether conscious or unconscious) can distort a judge's professional opinion, and there is little meaningful appellate review because the discretion afforded custody judges is virtually absolute deference. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE, PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW, 728-729 (1995).

As in North Carolina, the custody judge is given "broad discretion in determining the custodial setting that will advance the welfare and best interest of minor children." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Review of such discretion is even more amorphous. "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, . . . only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The irrationality of the best interest test and the absence of meaningful appellate review is especially apparent in the case at bar. The North Carolina Supreme Court's confirmation of the trial judge is strikingly illustrative of the fundamental problem with appellate review. Despite a lengthy discourse by the Court of Appeals' dissent regarding the inadequacy of the trial judge's order – in terms of findings of fact, the lack of relevancy or evidentiary support for findings, the failure of the findings to address the child's needs, the omission of findings warranted by the evidence, and other deficiencies – (App. 45-49) the Supreme Court upheld the trial court order in one sentence, with no discussion whatever of the order's

content. It said: "Our review of the custody order in the case at issue reveals that the trial court's findings of fact are supported by record evidence and that those findings, in turn, support the trial court's conclusions of law." (App. 24-25) The opinion ignores the facts, the evidence, and the failure of the trial court to consider or even acknowledge the child's entire life history.[4]

To combat the arbitrariness of the best interest test, many states, as shown above, continue the maternal presumption in illegitimate child custody cases. Some states which have abrogated the presumption, and others that have not, have at least enacted statutes which, to varying degrees, define and give some meaning and content to the term "best interest." *E.g.*, ALASKA STAT. § 25.24.150(c); ARIZ. REV. STAT. ANN. § 25-403; CAL. FAM. CODE § 3011; COLO. REV. STAT. § 14-10-124; CONN. GEN. STAT. § 46b-56; DEL. CODE ANN. tit. 13 § 722; D.C. CODE ANN. § 16-914; HAW. REV. STAT. § 571-46; IDAHO CODE § 32-717; ILL. REV. STAT. ch. 750 para. 5/602; IND. CODE § 31-17-2-8; IOWA CODE § 598.41(3); KAN. STAT. ANN. § 60-1610(a)(3); KY. REV. STAT. ANN. § 403.270; ME. REV. STAT. ANN. tit. 19 § 1653; MASS. GEN. L. ch. 209C § 10; MICH.

[4] A recent manuscript by Suzanne Reynolds, author of the state's exhaustive treatise, LEE ON NORTH CAROLINA FAMILY LAW, reported that in the 23 custody cases appealed from trial courts in the state during the one year period from April, 2002, through March, 2003, only one was awarded custody to the mother. In all eight cases that were initial determinations, custody was awarded to fathers despite each mother having been the primary caretaker, and the trial court awards were ultimately upheld on appeal. *See* Suzanne Reynolds, *Child Custody in North Carolina: The Primary Caregiver Handicap?*, Manuscript presented to NCAWA (October 4, 2003).

COMP. LAWS § 722.23; MINN. STAT. § 518.17; MISS. CODE ANN. § 93-5-24; MO. REV. STAT. § 452.375-2; MONT. CODE ANN. § 40-4-212; NEB. REV. STAT. § 42-364(2); NEV. REV. STAT. § 125.480-4; N.J. REV. STAT. § 9:2-4(c); N.M. STAT. ANN. § 40-4-9; N.D. CENT. CODE § 14-09-06.2; OR. REV. STAT. § 107.137; TENN. CODE ANN. § 36-6-106; UTAH CODE ANN. § 30-3-10.2; VT. STAT. ANN. tit. 15 § 665; VA. CODE ANN. § 20-124.3; WASH. REV. CODE § 26.09.002; W. VA. CODE § 48-9-206;[5] WIS. STAT. § 767.24; WYO. STAT. § 20-2-201. These factors often include consideration of who has provided care for the child in the past, where the child wants to live, the quality of the child's relationship with each party, whether there are siblings or other important relationships, and how the child has adjusted since separation or living with one parent. With such guidelines, the presumption's rationale continues in that children are more likely to be kept where they have been raised unless there is a compelling reason to move them.

For illegitimate children, the need for guidelines is even more important because their numbers are increasing while the participation of their fathers is decreasing. "[I]ncreasing numbers of biological fathers are disengaging from their children or were never actively involved." Rob Palkovitz, *Involved Fathering & Child Development: Advancing Our Understanding of Good Fathering*, 119,

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[5] The American Law Institute has suggested, and West Virginia has enacted, a custody statute allocating custodial time proportionate to the time parents had spent caring for the child prior to separation, or if they never lived together, prior to the institution of the custody action. Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.08, A.L.I. (2002); W. VA. CODE § 48-9-206.

121, HANDBOOK OF FATHER INVOLVEMENT, MULTIDISCIPLINARY PERSPECTIVES (Catherine S. Tamis-LeMonda & Natasha Cabrera, eds., 2002). Most unwed fathers "[do] not live with their offspring and often ha[ve] little or no contact with them." MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS, THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES, 146 (1994).

> [T]he nonmarital birth rate has soared in the last 40 years. In 1960, 225,000 children (five out of 100 children) were born to unmarried mothers. By 1994, the number had risen to 1.2 million (33 children out of 100), a 433 percent increase since 1960. In America today, the 1.2 million children who start off life in a single-parent household each year because they are born to unmarried parents represent a larger group than the 1 million children who move into a single–parent household as a result of their married parents' separation or divorce.

Battle Robinson and Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act* (2000), 19 DEL. LAWYER 23, 23 (Summer, 2001) (citations omitted).

In all of the states continuing the presumption, Kayla would not have been removed from her mother's home. In most, if not all, of the states with specified guidelines, Kayla would have remained with her family. She should have been able to do so in North Carolina. Both she and her mother had every reason to expect such an outcome, but the playing field changed without notice and complete and unfettered discretion under a best interest rule permitted a judge to award custody to a man who was a father in biology alone, rather than to the mother who had loved and cared for Kayla all five years of her life.

Surely, the due process guarantees of the Fourteenth Amendment to the United States Constitution require more than is provided by an indeterminate rule that gives no meaningful notice to anyone in terms of its content, is entirely arbitrary, and affords no meaningful appellate review. Across the nation, many children and their families are significantly affected on a daily basis in the name of "best interests."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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357 N.C. 193, 581 S.E.2d 41

Rosero v. Blake

No. 322A02

SUPREME COURT OF NORTH CAROLINA

March 10, 2003, Heard In the Supreme Court
June 13, 2003, Filed

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 250, 563 S.E.2d 248 (2002), reversing and remanding an order for permanent custody entered 2 January 2001, *nunc pro tunc* 12 December 2000, by Judge Anne Salisbury in District Court, Wake County. On 15 August 2002, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court 10 March 2003.

Kathleen Murphy for plaintiff-appellant.

Sally H. Scherer for defendant-appellee.

The Sandlin Law Firm, by Deborah Sandlin, on behalf of the North Carolina Academy of Trial Attorneys, amicus curiae.

BRADY, Justice.

BRADY

The questions presented for review are whether the North Carolina common-law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law and whether

that presumption violates the federal and state Constitutions. We conclude that the common-law rule has been abrogated by statute, and accordingly, we reverse the decision of the Court of Appeals.

The parties to this action are the natural parents of Kayla Alexandria Rosero, born 20 March 1996. Following brief sexual encounters between the parties in 1995, plaintiff, Kayla's father, moved to the state of Oklahoma, where he resided at the time of Kayla's birth. Kayla's mother, defendant, resided at all times in North Carolina with Kayla and Kayla's two older, half brothers. The parties were never married to each other.

Upon being informed of Kayla's birth, first by defendant and then by the Wake County Child Support Enforcement Agency, plaintiff submitted to a blood test, which proved that he was Kayla's father. Plaintiff acknowledged paternity on 3 March 1997 by signing a "Father's Acknowledgment of Paternity" prepared pursuant to N.C.G.S. § 110-132(a), and an "Order of Paternity" was subsequently entered pursuant to the acknowledgment. Plaintiff agreed to and began providing support for Kayla without a court order. Plaintiff has never legitimated Kayla pursuant to N.C.G.S. § 49-10 or sought a judicial determination of paternity as provided for in N.C.G.S. § 49-14.

Kayla continued to reside with defendant in North Carolina but visited regularly with plaintiff and his wife in Oklahoma. Defendant maintained a relationship with Clea Johnson, the father of her other children, and Kayla also became close to Johnson, calling him "daddy Clea." Defendant worked rotating shifts at a local medical facility, and as a result, Kayla often spent nights and weekends with

defendant's mother and grandmother. Defendant's mother worked at the day care attended by Kayla.

Kayla's visits with her father in Oklahoma consisted of long weekends. Defendant flew with Kayla to meet plaintiff in Oklahoma, facilitating the minor child's visits with her father. On three or four occasions, Kayla visited with her father two weeks at a time. Plaintiff also visited Kayla in North Carolina and kept in contact with her through telephone calls and other correspondence.

On 22 March 2000, shortly after Kayla's fourth birthday, plaintiff initiated the present action for primary custody of his minor child, alleging that awarding him custody was in her best interest. Defendant answered plaintiff's allegations and filed a counterclaim for primary custody. According to defendant, she should retain primary custody, as it is in Kayla's best interest to remain in North Carolina and in the environment to which she had become accustomed. Four and one-half months after initiating the custody proceeding, but prior to a hearing, plaintiff and his wife moved to North Carolina and continued regular visits with the child.

Upon hearing testimony and arguments from both parties, the trial court awarded primary custody to plaintiff. In an order entered 2 January 2001, signed *nunc pro tunc* 12 December 2000, the court concluded that, although both parents were fit and proper, it was in Kayla's best interest that she be placed in plaintiff's primary custody. The court found support in its conclusion in the stable and structured life provided by plaintiff and his wife, a person with whom Kayla had developed a loving relationship. The trial court noted that, in contrast to the environment created by plaintiff, defendant's social life

and work schedule created a "hectic household" that did not meet the child's needs for stability and consistency. Defendant appealed the order for permanent custody.

During the pendency of defendant's appeal, plaintiff took physical custody of Kayla, and in turn, defendant filed a motion for a protective order with the trial court. The trial court denied the motion for a protective order.

On 21 May 2002, a divided panel of the Court of Appeals reversed the trial court's order awarding custody to plaintiff and remanded the case for a new hearing consistent with its opinion. *Rosero v. Blake,* 150 N.C. App. 251, 563 S.E.2d 248 (2002). The Court of Appeals began by concluding that the trial court did not err in refusing to grant the protective order. *Id.* at 254, 563 S.E.2d at 251. Relevant to our review, the Court of Appeals further concluded that, in awarding custody to plaintiff based upon what was in Kayla's best interest, the trial court ignored the common-law presumption that custody of an illegitimate child should be awarded to the mother, absent a showing that she is unfit or otherwise unable to care for the minor child. *Id.* at 260, 563 S.E.2d at 255. Judge Ralph Walker concurred in part and dissented in part with a separate opinion. Judge Walker found no error in the trial court's application of the best interest of the child standard because it was his belief that the common-law presumption in favor of the mother had been abrogated by statute. *Id.* at 262, 563 S.E.2d at 256 (Walker, J., concurring in part and dissenting in part). Judge Walker also concluded that the case should be remanded for more detailed findings, as the trial court's findings were not supported by competent evidence. *Id.* at 266, 563 S.E.2d at 258 (Walker, J., concurring in part and dissenting in part).

The case is now before this Court pursuant to plaintiff's appeal of right based upon Judge Walker's dissent and plaintiff's petition for discretionary review of an additional issue allowed by this Court.

We find it appropriate to begin with a brief background into the common-law presumption giving rise to plaintiff's appeal. Under early North Carolina common law, an illegitimate child was *nullius filius,* meaning that the child had "no father known to the law, no distinction being made between a reputed father and an admitted father." *Allen v. Hunnicutt,* 230 N.C. 49, 50, 52 S.E.2d 18, 19 (1949). Thus, custody of an illegitimate child was to be presumptively awarded to the mother unless she was deemed unsuitable. *See, e.g., Jolly v. Queen,* 264 N.C. 711, 713, 142 S.E.2d 592, 595 (1965); *Browning v. Humphrey,* 241 N.C. 285, 287, 84 S.E.2d 917, 918-19 (1954); *In re Shelton,* 203 N.C. 75, 79, 164 S.E. 332, 334 (1932). This well-established presumption in favor of the child's mother could be rebutted by the putative father only if he proved that "the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides [the mother's] paramount right to custody." *Jolly,* 264 N.C. at 714, 142 S.E.2d at 595. The presumption dates back to pre-America England, where "between the father and the mother . . . , the latter seems to have the prior claim; for if the father obtained the custody surreptitiously, the king's bench would make him restore it." *Moritz v. Garnhart,* 7 Watts 302, 303 (Pa. 1838) (citation omitted). The mother's paramount right to custody was based upon the "frequent doubt as to the child's father, and [the fact] that the mother, nearest in interest and affection to the child, would best promote its welfare." *Wall v.*

Hardee, 240 N.C. 465, 466, 82 S.E.2d 370, 372 (1954); *see also Moritz,* 7 Watts at 303 ("Though [a child born out of wedlock] be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance.").

The North Carolina General Statutes provide that common law, "which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, [is] hereby declared to be in full force within this state." N.C.G.S. § 4-1 (2001) (last amended in 1778). Thus, because the common-law presumption recognizing a preference for maternal custody of an illegitimate child had not been abrogated, a putative father was on unequal footing with the mother unless he had the child statutorily legitimated either through a legitimacy proceeding as provided for by N.C.G.S. § 49-10 or through subsequent marriage to the child's mother pursuant to N.C.G.S. § 49-12. *See* N.C.G.S. § 49-11 (2001) ("The effect of legitimation . . . shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock. . . .").

In 1955, this Court held that a putative father was a "parent" as defined by North Carolina's general custody statute in effect at that time, N.C.G.S. § 50-13 (1950) (repealed 1967), and therefore had a right to maintain an action for custody of his illegitimate child under that

statute.[1] *Dellinger v. Bollinger,* 242 N.C. 696, 699, 89 S.E.2d 592, 594 (1955) ("Certainly [N.C.G.S. § 50-13] is sufficiently broad and comprehensive to include this proceeding which is a controversy respecting the custody of a child."). Although a putative father could *maintain* an action for custody under N.C.G.S. § 50-13, this Court confirmed, as late as 1965, that to be awarded custody, the putative father must still overcome the common-law presumption for awarding custody in favor of the mother. In *Jolly v. Queen,* 264 N.C. 711, 142 S.E.2d 592 (1965), a mother sought to retain custody of her illegitimate child under circumstances remarkably similar to those existing in the present case. The father in *Jolly* had held his illegitimate child out as his son, had cared for the child, and had provided for him. However, the father failed to have the child legitimated.

This Court reversed the trial court's award of custody to the putative father based upon the trial court's finding that such an award was in the child's best interest. *Id.* at 716, 142 S.E.2d at 596. In so doing, this Court referenced the maternal – preference presumption, noting that when confronted with a similar situation in the past, the Court

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[1] N.C.G.S. § 50-13 provided for a custody proceeding pursuant to a divorce. In 1949, the General Assembly amended the statute to include not only custody actions arising out of divorce proceedings, but also "controversies respecting the custody of children not provided for by . . . G.S. 17-39." Act of Apr. 15, 1949, ch. 1010, sec. 1, 1949 N.C. Sess. Laws 1148, 1148. N.C.G.S. § 17-39, as found in the 1953 edition of our General Statutes, provided *habeas corpus* relief to determine custody where husband and wife were living separate and apart. 3 Robert E. Lee, *North Carolina Family Law* § 222 (3d ed. 1963) [hereinafter Lee's *Family Law*]. Both N.C.G.S. § 17-39 and § 50-13 were repealed in 1967. Act of July 6, 1967, ch. 1153, sec. 1, 1967 N.C. Sess. Laws 1772, 1772.

was not "'presented with convincing authority'" to sustain a trial court's conclusion that the best interest of an illegitimate child would be served by placing it with the father. *Id.* at 715, 142 S.E.2d at 595 (quoting *In re Care & Custody of McGraw,* 228 N.C. 46, 47, 44 S.E.2d 349, 350 (1947)). The Court went on to emphasize the following:

> In this case [the putative father] has taken no steps to legitimate the son whose custody he now claims. Therefore, under our intestacy laws, the child cannot inherit from his father or his father's relatives. Should [the putative father] die, [his wife], of course, would have no legal obligation to the boy. The child and his lineal descendants can take "by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him." G.S. 29-19. Should [the mother] and her husband desire that he adopt the [child], [the father's] consent would be unnecessary. The child's domicile is that of his mother. . . . The only legal right which the boy can enforce against his putative father is provided by Gen. Stats., ch. 49, art. I.[2] But this article is not primarily to

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[2] At the time this Court decided *Jolly,* N.C.G.S. §§ 49-1 to -9 provided the exclusive remedy for collecting financial support for an illegitimate child. Pursuant to sections 49-1 to -9, a criminal action could be brought in the name of the state against a reputed father for his willful negligence to support his illegitimate child. 2 Lee's *Family Law* § 177. Violation of the statute was punishable as a misdemeanor, and, upon finding a violation, the judge was to set an amount of support to be paid by the father. *Id.* Any benefit to the child was incidental to the statute's purpose, which was to prevent illegitimate children "from becoming public charges." *Allen,* 230 N.C. at 51, 52 S.E.2d at 19. Those same provisions, with subsequent modifications, still govern criminal

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> benefit illegitimate children but to prevent them from becoming public charges.

Jolly, 264 N.C. at 715, 142 S.E.2d at 595-96 (citations omitted).

The Court in *Jolly* envisioned a derogation to parents' paramount right to custody of their children by sustaining a finding that the *Jolly* child's best interest would be served by placing him with his father, a person with whom the child had no legal relationship. According to the Court,

> a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents, who were providing him with the necessities, that his custody be given to a more affluent neighbor or relative who had no child and desired him. Such a finding, however, could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time in the neighbor's home. In other words, the parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances. So it is with the paramount right of an illegitimate [child's] mother.

Id. at 715-16, 142 S.E.2d at 596.

It is against this background that we consider the dispositive issue for which plaintiff appealed of right to this Court: Whether the North Carolina common-law rule

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actions for nonsupport of illegitimate children today. *See* N.C.G.S. § 49-1 to -9 (2001).

that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law. Concluding that the presumption no longer exists as law in this state, we reverse the Court of Appeals' decision to the contrary for the reasons stated below.

There is no question that the landscape of our law governing child custody, the rights of unwed fathers, and the rights of illegitimate children changed dramatically beginning shortly after our 1965 decision in *Jolly*. In 1967, our General Assembly repealed all prior statutes governing the custody of minor children and enacted N.C.G.S. § 50-13.1 to -13.8, a statutory scheme under which all child custody actions are now to be brought. Ch. 1153, secs. 1-2, 1967 N.C. Sess. Laws at 1772-77; *see also Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981) (noting that although section 50-13.1 is contained within that portion of our General Statutes governing divorce and alimony, its application was not to be restricted to custody disputes within the context of separation or divorce). N.C.G.S. §§ 50-13.1 to -13.8 were enacted "to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes." *Oxendine*, 303 N.C. at 706, 281 S.E.2d at 374. When enacted, N.C.G.S. § 50-13.2 directed the trial courts to award custody based upon what "will best promote the interest and welfare of the child." Ch. 1153, sec. 2, 1967 N.C. Sess. Laws at 1772 (adopting the text still contained in N.C.G.S. § 50-13.2(a), (b)). Significant to our discussion here, the legislature further amended N.C.G.S. § 50-13.2 in 1977 to provide: "Between the mother and father, whether natural or adoptive, there is no presumption as to who will . . . better promote the interest and welfare of the

child." Act of June 8, 1977, ch. 501, sec. 2, 1977 N.C. Sess. Laws 582, 582-83 (amending subsection 50-13.2(a)) (The relevant portion of the current version of the statute provides the following: "Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.").

During the same year that the General Assembly enacted N.C.G.S. §§ 50-13.1 to -13.8, it adopted N.C.G.S. §§ 49-14, -15, and -16, abrogating common law to allow an illegitimate child's father to bring a judicial action establishing paternity. 3 Robert E. Lee, *North Carolina Family Law* § 251 (Supp. 1976). N.C.G.S. § 49-15, which has not been amended since its enactment in 1967, provides as follows:

> Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother.

N.C.G.S. § 49-15 (2001).

Soon after the enactment of and subsequent modifications to sections 50-13.1 to -13.8 and sections 49-14 to -16, our appellate courts acknowledged the legal consequences that followed therefrom. Notably, a 1974 decision by the Court of Appeals indicated that the common-law presumption for awarding custody of illegitimate children to their mothers had been abrogated. In *Conley v. Johnson,* 24 N.C. App. 122, 210 S.E.2d 88 (1974), the Court of Appeals

affirmed a trial court's award of visitation of an illegitimate child to her father based upon what was in the child's best interest. The trial court in *Conley* found that the plaintiff, who alleged that he was the child's father and had been previously ordered to pay child support in criminal court, was indeed the child's father and was "a fit, suitable and proper person to have reasonable visitation privileges." *Id.* at 123, 210 S.E.2d at 89. The mother appealed.

The Court of Appeals in *Conley* acknowledged that the mother's challenge to the trial court's award of visitation was based upon common law that dictated that an illegitimate child's father was not entitled to visitation unless visitation was consented to by the mother. *Id.* The court, however, citing *Dellinger,* 242 N.C. 696, 89 S.E.2d 592, and N.C.G.S. §§ 50-13.1 to -13.2 and 49-14 to -16, noted its belief that the common law had been abrogated by case and statutory law. *Conley,* 24 N.C. App. at 123-24, 210 S.E.2d at 89. The Court of Appeals concluded that the illegitimate child's father was entitled to all rights, duties, and obligations as was a parent under North Carolina statutes governing custody disputes. *Id.* at 124, 210 S.E.2d at 89-90. The court reasoned that if the father would be entitled to custody under section 50-13.1, surely he would be entitled to visitation. *Id.* at 124, 210 S.E.2d at 90.

In addition to those legislative changes acknowledged by the Court of Appeals in *Conley,* our General Assembly has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship between father and child. These provisions operate even where the father acknowledges paternity but fails to have his child judicially

legitimated or to seek a judicial determination of paternity. *See, e.g.,* N.C.G.S. § 7B-1111(a)(5) (2001) (providing that parental rights of an illegitimate child's biological father cannot be terminated where the father has established or acknowledged paternity based upon any one of four enumerated methods); N.C.G.S. § 31-5.5 (2001) (entitling afterborn illegitimate children to devises under biological father's will); N.C.G.S. § 49-12.1 (2001) (allowing the putative father to legitimate his biological child, born to a mother married to another man, thus rebutting the well-established presumption that the child is the offspring of the other man); N.C.G.S. § 97-2(12) (2001) (granting "acknowledged" illegitimate children benefits pursuant to our workers' compensation laws); N.C.G.S. § 143-166.2(a) (2001) (including illegitimate children in the definition of "dependent child" for the purpose of allowing them to receive death benefits if their fathers were employed as North Carolina law enforcement officers, firemen, or rescue squad employees).

The General Assembly has also provided a method by which putative fathers may formally acknowledge illegitimate children without initiating legitimation proceedings or judicial determinations of paternity. At the time plaintiff formally acknowledged his paternity, N.C.G.S. § 110-132(a)[3] provided, in pertinent part:

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[3] The Court of Appeals cited to a version of N.C.G.S. § 110-132(a) appearing in the 1999 edition of our General Statutes. *Rosero,* 150 N.C. App. at 259, 563 S.E.2d at 255; *see also* N.C.G.S. § 110-132(a) (1999) (amended 2001). The 1999 version of N.C.G.S. § 110-132(a) contained amendments from the 1997 session of the General Assembly, which included that portion of the statute that now allows for rescission. Act of Aug. 19, 1997, ch. 433, sec. 4.7, 1997 N.C. Sess. Laws 1275, 1285-86.

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> In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child ... shall have the same force and effect as a judgment. ...

N.C.G.S. § 110-132(a) (Supp. 1990) (amended 1997 and 2001).[4]

Because the 1997 amendments did not become effective until October 1997, *see* ch. 433, sec. 11.3, 1997 N.C. Sess. Laws at 1316, it appears that the version cited by the Court of Appeals included the allowance for rescission and was not applicable to plaintiff, who acknowledged his paternity in April of 1997. Thus, the version of the statute contained in the 1990 cumulative supplement of our General Statutes is the version that we note as being applicable to plaintiff.

[4] N.C.G.S. § 110-132(a), with recent additions underlined and omissions stricken, now provides:

> **§ 110-132. Acknowledgment Affidavit of paternity parentage and agreement to support.**
>
> (a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment affidavits of paternity parentage executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found shall constitute an admission of paternity and shall have the same force and legal effect as a judgment of that court; and a paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

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(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable neglect. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support said the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. Such written affirmations, acknowledgments The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary

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The above-noted statutory changes to our family-law jurisprudence follow or are reflective of many decisions from this Court and the United States Supreme Court. These decisions acknowledge that, absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children's welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, care, and control of their minor children must prevail. *See, e.g., Troxel v. Granville,* 530 U.S. 57, 72-73, 147 L. Ed. 2d 49, 61, 120 S. Ct. 2054 (2000) (recognizing that "the *Due Process Clause* [*of the United States Constitution*] does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"); *Caban v. Mohammed,* 441 U.S. 380, 392-93, 60 L. Ed. 2d

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agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether he the person is an adult or a minor. Such The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making such affirmation the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she makes affirmation attests.

N.C.G.S. § 110-132(a) (2001).

297, 307-08, 99 S. Ct. 1760 (1979) (holding that gender-based law that allowed a child's unwed mother to withhold consent to adopt the child but did not allow the same as to the child's father violated the *Equal Protection Clause*); *Stanley v. Illinois,* 405 U.S. 645, 657-58, 31 L. Ed. 2d 551, 562, 92 S. Ct. 1208 (1972) (concluding that there was a violation of an unwed father's due process rights where he had custody of his child after the mother had died and the child was taken from him without a hearing on his fitness); *Prince v. Massachusetts,* 321 U.S. 158, 166, 88 L. Ed. 645, 652, 64 S. Ct. 438 (holding that "it is cardinal with us that the custody, care and nurturing of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Owenby v. Young,* 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (affirming that biological and adoptive parents have a constitutionally protected liberty interest in the care and custody of their children); *Adams v. Tessener,* 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) (holding that in a custody action between natural parents and grandparents, grandparents were properly awarded custody because natural parents' conduct was inconsistent with their protected right to care for the child); *Price v. Howard,* 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (holding that due process afforded the parents of minor children a superior right to custody of that child in dispute between parents and nonrelatives where the parents have acted consistent with their constitutionally protected status); *Petersen v. Rogers,* 337 N.C. 397, 402-03, 445 S.E.2d 901, 904-05 (1994) (recognizing parents' constitutionally protected right to custody, care, and control of their children); *cf. Skinner v. Oklahoma,* 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) (striking

down involuntary sterilization law because it violated fundamental rights to marriage and procreation).

In light of the changes in our laws governing familial relationships, we conclude that the Court of Appeals improperly relied upon *Jolly v. Queen.* The relationship of the father in *Jolly* to his illegitimate child was governed by the strict common-law doctrine of *nullius filius,* dictating the presumption that custody of illegitimate children vested in their mother. The Court in *Jolly* refused to sustain the trial court's findings as to what was in the illegitimate child's best interest, where the child was not entitled to inherit from the father or his father's relatives and could be adopted without the father's consent. *Jolly,* 264 N.C. at 715, 142 S.E.2d at 595-96. As such, the Court was forced to look upon the father, not as a parent entitled to a legal relationship, but as a stranger who wished to take in an unrelated child and raise him as his own.

Since *Jolly,* the General Assembly has modified those statutes governing intestate succession and adoption discussed therein, such that the restrictions imposed upon an unwed father's estate and his right to consent to an adoption *no longer exist.* Unlike the child in *Jolly,* illegitimate children today are entitled to inherit from their fathers and his relatives, and their fathers would be entitled to inherit from them, even though they have not been legitimated. N.C.G.S. § 29-19(b)(2), (c) (2001); *see also Estate of Lucas v. Jarrett,* 55 N.C. App. 185, 188-89, 284 S.E.2d 711, 713-14 (1981) (noting that there was a change in section 29-19(b), the statute governing intestate succession where a child is illegitimate, since the decision in *Jolly*). Additionally, the consent of illegitimate children's fathers who acknowledged paternity would now be required for their adoption. *See* N.C.G.S. § 48-3-601(2)(b)

(2001). Further, in contrast to the father in *Jolly,* illegitimate children's fathers, including plaintiff, now benefit from the provisions of N.C.G.S. § 110-132(a), providing another method for formal acknowledgment of paternity, and other statutory provisions establishing legal ties between illegitimate children and their fathers, even though they may not have pursued legitimation procedures.

Moreover, we disagree with the Court of Appeals' majority that the vast changes to the law discussed above indicate only a patchwork of abrogations to the common law such that the presumption for awarding custody of an illegitimate child is still the law in this state. The majority reasoned that the differences between sections 110-132(a) and 49-14 support its conclusion that the presumption still exists, even where a father acknowledges paternity via section 110-132(a) and embraces his role as the illegitimate child's father. *See Rosero,* 150 N.C. App. at 258-59, 563 S.E.2d at 254. Unlike the Court of Appeals, we find the divergent purposes underlying the article in which N.C.G.S. § 110-132(a) is contained, to provide child support, and N.C.G.S. § 49-14, to determine paternity, irrelevant. The legislative intent of the comprehensive statutes addressing child welfare should be the paramount consideration. *See Brown v. Flowe,* 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) (noting that this Court construes multiple statutes governing a single subject *in pari materia* to effectuate legislative intent and "to harmonize them into one law on the subject"). Given the changes to our General Statutes discussed *supra,* the effects of acknowledging paternity, a judicial determination of paternity, and legitimation proceedings are similar: The illegitimate child is able to inherit by and through the father, the father is

able to inherit from his child, and the father's consent is needed for adoption.

We also note that the Court of Appeals' majority found support for its conclusion in the distinction between the high standard for establishing paternity judicially under section 49-14, that is, by clear and convincing evidence, and the complete lack of standards for acknowledging paternity in section 110-132(a). *Rosero,* 150 N.C. App. at 259, 563 S.E.2d at 254-55. The majority further found it significant that acknowledgment under the version of section 110-132(a) appearing in the 1999 edition of our General Statutes could be rescinded, while a judicial determination of paternity was absolute. *Id.* According to the Court of Appeals, these distinctions indicated that a father acknowledging paternity under section 110-132(a) was not on equal footing with the father who had received a judicial determination of paternity. Thus, the court reasoned, the maternal-preference presumption still applied to the detriment of the father who acknowledged paternity under N.C.G.S. § 110-132(a). *Id.* at 260, 563 S.E.2d at 255. Again, we disagree. Although section 110-132(a) does not provide for even a modicum of proof of paternity, it does require, in both the current version and the version in effect for this case, that the child's mother affirm that the acknowledging father is, in fact, the natural father. Such a requirement prevents a man from "simply declaring his paternity of a child unilaterally and easily filing for a court order approving his acknowledgment and agreement to support." *Durham Cty. Dep't of Soc. Servs. v. Williams,* 52 N.C. App. 112, 117 n.3, 277 S.E.2d 865, 869 n.3 (1981). Furthermore, whether the affirmation of paternity can be rescinded is irrelevant. At the time custody is adjudicated, a father who affirms his

paternity pursuant to section 110-132(a) and pays child support in conjunction with that affirmation is acting consistent with his right to care for and have control of the child. As with any custody determination, the arrangement arrived at by the trial court can subsequently yield to a modification based upon a substantial change in circumstances.

Given the legal relationship between fathers and their illegitimate children now existing by virtue of certain statutory enactions, we believe that the legislature's 1977 modifications to N.C.G.S. § 50-13.2(a) represent an express abrogation of the common-law presumption at issue in the present case. As noted *supra,* given the unambiguous 1977 modification, N.C.G.S. § 50-13.2(a) now provides that "between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child." We are unpersuaded by defendant's argument that N.C.G.S. § 50-13.2(a) applies only to abrogate the so-called "tender years" doctrine, which previously provided that a mother had the superior right to custody of her young children. *See Westneat v. Westneat,* 113 N.C. App. 247, 251, 437 S.E.2d 899, 901 (1994). To determine whether N.C.G.S. § 50-13.2(a) abrogated the presumption at issue, we must examine its plain language. *State v. Dellinger,* 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, BSA, Inc.,* 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). Neither section 50-13.2(a) nor the case in which the Court of Appeals held that the "tender years" doctrine was no longer applicable, *Westneat,* expressly

provides that the statute abrogates only the "tender years" doctrine. There is absolutely nothing in the plain language of section 50-13.2(a) or *Westneat* that supports defendant's assertion. We therefore conclude that, by its plain language, the statute clearly abrogates the common-law presumption vesting custody of an illegitimate child in the child's mother.

Applying N.C.G.S. § 50-13.2(a) in such a manner is not only dictated by its plain language, but also ensures that the best interest of the child, illegitimate or legitimate, not the relationship, or lack thereof, between natural or adoptive parents, is the district court's paramount concern. For, as between natural or adoptive parents, "the welfare of the child has always been the polar star which guides the courts in awarding custody." *Pulliam v. Smith,* 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998); *see also Owenby,* ___ N.C. at ___, 579 S.E.2d at 267. Several courts in our sister states have applied this same reasoning to find the common-law presumption for awarding custody in favor of the illegitimate child's mother no longer applicable, with varying degrees of consideration given to the method by which the father acknowledged or established paternity. *See Heyer v. Peterson,* 307 N.W.2d 1, 7 (Iowa 1981) (noting that "the controlling consideration must be the interests of the child"); *Cox v. Hendricks,* 208 Neb. 23, 27, 302 N.W.2d 35, 38 (1981) (acknowledging and adopting the "clear trend in recent cases . . . to disregard the fact that a child was born out of wedlock in deciding custody disputes between natural parents"); *In re Byrd,* 66 Ohio St. 2d 334, 338, 421 N.E.2d 1284, 1286-87 (1981) (recognizing that use of best interest standard, rather than the maternal-preference presumption, promotes equality between the right of legitimate and illegitimate children to

be placed with the parent who would promote their best interest); *see also Pi v. Delta,* 175 Conn. 527, 530-31, 400 A.2d 709, 710-11 (1978) (concluding that although state statute provides that the mother of an illegitimate child was that child's sole guardian, custody should be determined according to what is in the child's best interest); *Bazemore v. Davis,* 394 A.2d 1377, 1379 (D.C. Ct. App. 1978) (noting that in custody disputes between natural parents, the best interest of the child standard applies); *Race v. Sullivan,* 612 So. 2d 660, 661 (Fla. Dist. Ct. App. 1993) (holding that "the shared parental responsibility law . . . is applicable to non-married parents" and that the best interest of the child standard applies as between non-married parents); *In re Custody of Bourey,* 127 Ill. App. 3d 530, 533, 469 N.E.2d 386, 388, 82 Ill. Dec. 852 (1984) (noting that "the best interest of the child guides the decision, no matter what form the proceedings may take"); *La Grone v. La Grone,* 238 Kan. 630, 632-33, 713 P.2d 474, 476 (1986) (holding that "an unwed parent, whether mother or father, should be treated the same as any other parent for the purpose of determining custody" and that the best interest of the child standard should apply); *Walton v. DeBlieux,* 428 So. 2d 937, 939 (La. Ct. App. 1983) (holding that "the criteria applicable in determining the custody of legitimate children are also applicable in determining the custody of illegitimate children"). *But see Ex parte D.J.,* 645 So. 2d 303 (Ala. 1994) (per curiam) (concluding that maternal presumption for custody of an illegitimate child was still good law in that state); *Taylor v. Commonwealth,* 260 Va. 683, 537 S.E.2d 592 (2000) (holding that defendant's status as fiancee to the unwed father of the ten-month-old victim did not excuse the defendant's actions in assisting in the kidnapping of the child because the right of the father to immediate custody

of the child was inferior to that of the mother). If the reasoning of the Court of Appeals in its 1974 decision in *Conley v. Johnson* was correct – that the common-law presumption in favor of the mother had already been abrogated by case law and the 1967 amendments to our General Statutes – there is no question that the presumption no longer exists in this, the twenty-first century.

The above-noted modification to N.C.G.S § 50-13.2(a) was an abrogation of the common-law presumption at issue in the present case. That abrogation, coupled with those changes to our General Statutes recognizing the legal relationship between parent and illegitimate child, establishes that an illegitimate child's father who has acknowledged or affirmed his paternity under section 110-132(a) and whose conduct is consistent with his right to care for and control his child, no longer stands as a third party in relation to his illegitimate child. We therefore hold that the father's right to custody of his illegitimate child is legally equal to that of the child's mother, and, as dictated by section 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child. Accordingly, in the present case, the trial court did not err in applying the best interest of the child standard.

As we have determined that the best interest of the child standard was properly applied in the present case, we must now review the trial court's findings of fact and conclusions of law in accordance with that standard. "In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby,* ___ N.C. at ___, 579 S.E.2d at 268. Our review of the custody order in the case at issue reveals

that the trial court's findings of fact are supported by record evidence and that those findings, in turn, support the trial court's conclusions of law. We therefore affirm the trial court's order awarding custody of Kayla to plaintiff.

In conjunction with plaintiff's appeal of right discussed *supra,* this Court granted plaintiff's petition for discretionary review of an additional issue: Whether the common-law presumption that the mother of an illegitimate child retains a superior right to that child's custody violates the *Equal Protection Clause of the United States* and North Carolina Constitutions. Because we have determined that this presumption has been abrogated by statute, we need not address whether it violates plaintiff's rights under the United States and North Carolina Constitutions. *See Anderson v. Assimos,* 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (noting that "the courts of this state will avoid constitutional questions. even if properly presented, where a case may be resolved on other grounds").

Because a mother's right to the custody of her illegitimate child is no longer superior to that of the child's father, the trial court properly applied the best interest of the child standard as between the parties to the present action. Furthermore, the evidence of record supports the trial court's findings of fact, which further supports the trial court's conclusion that awarding custody of Kayla to plaintiff was in Kayla's best interest. Accordingly, we reverse the Court of Appeals' decision and remand this case to that court for further remand to the District Court, Wake County, for reinstatement of the trial court's order.

REVERSED.

563 S.E.2d 248, 150 N.C. App. 250

DANIEL FABRICIO ROSERO, Plaintiff-Appellee, v. LISA BLAKE, Defendant-Appellant.

NO. COA01-350, NO. COA01-483

COURT OF APPEALS OF NORTH CAROLINA

January 23, 2002, Heard In the Court of Appeals

May 21, 2002, Filed

Wake County. No. 00 CVD 3146. Appeal by defendant from order entered 2 January 2001 by Judge Anne Salisbury and from order entered 26 January 2001 by Judge Paul Gessner in District Court, Wake County.

COUNSEL:

Kathleen Murphy for plaintiff-appellee.

Sally H. Scherer for defendant-appellant.

JUDGES:

McGEE, Judge. Judge BIGGS concurs. Judge WALKER concurs in part and dissents in part with a separate opinion.

OPINION BY:

McGEE

Defendant appeals an order filed 2 January 2001 granting primary legal custody of the parties' minor child to plaintiff. Defendant further appeals an order filed 26 January 2001 dismissing her motion for a protective order for lack of subject matter jurisdiction.

Plaintiff and defendant are the natural parents of Kayla Alexandria Rosero (Kayla), who was born on 20 March 1996. The parties had a brief relationship in 1995, while plaintiff was living in North Carolina. In December of that year, plaintiff moved to Oklahoma. After Kayla's birth, plaintiff agreed to submit to a paternity test which confirmed that he was Kayla's biological father. Plaintiff acknowledged paternity by signing a "Father's Acknowledgment Of Paternity" form prepared in accordance with N.C. Gen. Stat. § 110-132 on 3 March 1997. The parties agreed that Kayla would remain in defendant's care, where she had lived all her life, and that plaintiff would provide child support.

During the next three years, Kayla visited with plaintiff and his wife on several occasions, including visits to Oklahoma for a long weekend, or for a period of two or three weeks. Plaintiff maintained contact with Kayla through letters, telephone calls, and visits when he traveled to North Carolina.

Defendant is also the mother of two minor sons. The boys' father, Clea Johnson, continues to have contact with his sons and has developed a relationship with Kayla. Kayla often refers to him as "daddy Clea." Defendant's mother and grandmother assist her in caring for the three children. Defendant's mother is employed at the daycare center where Kayla is enrolled and cares for Kayla when defendant is at work or away.

Plaintiff filed this action seeking custody of Kayla on 22 March 2000, while he was still living in Oklahoma. Defendant responded and filed a counterclaim for custody, alleging that although plaintiff was a fit and proper person to have visitation with Kayla, it was in Kayla's best interest for the child to remain in defendant's custody. Prior to the hearing, plaintiff and his wife moved back to North Carolina. The trial court heard evidence from both parties, found both parties to be fit parents, and awarded "primary legal custody" of Kayla to plaintiff and "secondary physical custody" to defendant.

I.

Defendant first appeals the trial court's denial of her motion for a protective order, which she filed approximately two weeks after the entry of the custody order.

The record shows that on 11 January 2001, defendant gave notice of appeal from the custody order and petitioned this Court for a writ of supersedeas and a temporary stay. On that date, our Court issued a temporary stay but reserved ruling on the writ of supersedeas pending a response by plaintiff. During this time, Kayla continued to live with defendant. However, on 15 January 2001, plaintiff took physical custody of Kayla by removal of the child from the home of her maternal grandmother.

Defendant moved the trial court for a protective order on 17 January 2001, alleging plaintiff had caused Kayla to be "abducted." Defendant further alleged that plaintiff had refused to allow her to have any contact with Kayla. Defendant requested the trial court to (1) "issue an injunction protecting the child by prohibiting the plaintiff from taking her from the defendant's physical custody at any

time unless agreed upon by the parties in advance or ordered by" the trial court; and (2) that "plaintiff be ordered to return the child to the defendant's home immediately[.]"

The trial court dismissed defendant's motion on 26 January 2001 on the grounds that because its custody order was on appeal to this Court, the trial court lacked jurisdiction to grant the relief defendant requested. On the same date, this Court denied defendant's petition for a writ of supersedeas and dissolved the temporary stay. However, this Court's order noted that the trial court retained jurisdiction to entertain motions based on defendant's allegations so that it might "enter any interlocutory orders needed to enforce the custody order or to protect the interests of the parties and the welfare of the child pending the outcome of the appeal."

Pursuant to N.C. Gen. Stat. § 1-294, a perfected appeal stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (1999). Additionally, our Supreme Court has held that an appeal of a custody order leaves the trial court "*functus officio*" with regard to all custody matters until the cause is remanded. *Joyner v. Joyner,* 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962). The law of this State mandates that once a custody order is appealed, the trial court is divested of jurisdiction over all matters specifically affecting custody. *Accord Hackworth v. Hackworth,* 87 N.C. App. 284, 360 S.E.2d 472 (1987).

Nevertheless, defendant contends that since the trial court has a continuing duty to protect Kayla's welfare, it retained jurisdiction to grant the relief she requested. N.C. Gen. Stat. § 50-13.3(a) (1999) states that:

Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal.

Defendant correctly asserts that the trial court's duty to protect Kayla's welfare continues pending the outcome of the appeal. *See Joyner,* 256 N.C. at 591, 124 S.E.2d at 727. Indeed, this Court's order dissolving the temporary stay acknowledges that the trial court retained jurisdiction "to entertain any motions . . . to protect the interests of the parties and the welfare of the child pending the outcome of the appeal."

As our Court noted in *Upton v. Upton,* 14 N.C. App. 107, 187 S.E.2d 387 (1972), filing an appeal did not authorize a violation of the order of the trial court and that "'one who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded'" to the trial court. *Id.* at 109, 187 S.E.2d at 389 (quoting *Joyner,* 256 N.C. at 591, 124 S.E.2d at 727).

While in no manner condoning alleged actions of plaintiff in obtaining physical custody of Kayla, the relief sought by defendant appears to be directed toward staying the custody order pending appeal. If the trial court had granted the relief requested by defendant, it would have effectively kept Kayla in defendant's primary custody while the case was on appeal. *See Carpenter v. Carpenter,*

25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) (the purpose of N.C. Gen. Stat. § 1-294 is to prevent the trial court from undertaking the very matters which were embraced in a previous order).

Our Court has stated that upon appeal from the trial court's judgment, "'all further proceedings in the cause' are suspended in the trial court during the pendency of the appeal, and the trial court 'is without power to hear and determine questions involved in [the pending] appeal[.]'" *Cox v. Dine-A-Mate, Inc.,* 131 N.C. App. 542, 544, 508 S.E.2d 6, 7 (1998) (quoting *Lowder v. Mills, Inc.,* 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981)). As stated above, N.C.G.S. § 1-294 provides that "appeal of [a] judgment stays all further proceedings in the trial court '*upon the matter embraced therein*[,]'" which in the case before us is the custody of Kayla. *Cox,* 131 N.C. App. at 544, 508 S.E.2d at 7 (emphasis added). The trial court is only empowered to "'proceed upon any other matter included in the action and *not affected by the judgment appealed from*' . . . so long as they do not concern the subject matter of the suit." *Id.* at 544, 508 S.E.2d at 7-8 (quoting *Woodward v. Local Governmental Employees' Retirement Sys.,* 110 N.C. App. 83, 85-86, 428 S.E.2d 849, 850 (1993)). Both statutory and case law direct that the trial court lost jurisdiction over all matters dealing specifically with custody in this case when defendant appealed the custody order of the trial court. Accordingly, we conclude the trial court properly determined that it was without jurisdiction to grant defendant's motion, which was directly related to and would have affected the custody order that was on appeal.

II.

Defendant argues the trial court applied an improper standard in determining who is entitled to custody of Kayla. She contends that since plaintiff has failed to legitimate Kayla, the trial court must first find that defendant is unfit or otherwise unable to care for Kayla before it can apply a "best interest of the child" analysis to determine who should have primary custody. In response, plaintiff asserts the trial court did apply the proper legal standard.

In support of her contention that the trial court applied an improper legal standard, defendant relies on our Supreme Court's decision in *Jolly v. Queen,* 264 N.C. 711, 142 S.E.2d 592 (1965). In *Jolly,* the mother of an illegitimate child petitioned for custody of her seven-year-old son. The evidence showed that the child had lived intermittently with his father and mother but was currently living with his father. Although the father had acknowledged the child as his son, he had failed to "legitimate" the child. The trial court found both the mother and father were fit and suitable persons to have custody but concluded that it was in the child's best interest that primary custody be awarded to the father. Our Supreme Court reversed, holding the trial court applied an improper legal standard. Relying on the common law, the Court stated that the mother of an illegitimate child is presumed to have a superior right to custody of her child as against all others, including the child's putative father.

Our Supreme Court held in *Jolly* that: "'It is well settled law in this State . . . that the mother of an illegitimate child . . . has the legal right to [the] custody, care and control, if a suitable person, even though others may offer

more material advantages in life for the child[.]'" *Jolly,* 264 N.C. at 713-14, 142 S.E.2d at 595 (quoting *Browning v. Humphrey,* 241 N.C. 285, 287, 241 N.C. 285, 84 S.E.2d 917, 918 (1954)). The Supreme Court stated that "'as between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior. . . . '" *Jolly,* 264 N.C. at 714, 142 S.E.2d at 595 (quoting 98 A.L.R.2d 417, 431). The Court further held that "as against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child[.]" *Jolly,* 264 N.C. at 714, 142 S.E.2d at 595.

The common law presumption in favor of the mother of an illegitimate child stems in part from an issue peculiar to the illegitimate child's situation: uncertainty as to the identity of the father of the child. When a child is born to a married woman, her husband is legally presumed to be the child's father. *Jones v. Patience,* 121 N.C. App. 434, 466 S.E.2d 720, *disc. review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996). However, no legal presumption arises as to the identity of the father of a child born to an unmarried woman since, "the female is present at the birth of the child and [is] identifiable as the mother," *Stanley v. Illinois,* 405 U.S. 645, 661-62, 31 L. Ed. 2d 551, 564-65, 92 S. Ct. 1208 (1972), while the identity of the father may be uncertain. Thus, the putative father of a child is defined as the "alleged or reputed father of a child born *out of wedlock.*" Black's Law Dictionary, 1237 (6th ed.1990) (emphasis added).

The power to abrogate the common law presumption rests only with the General Assembly or our Supreme

Court. The General Assembly has specifically established procedures whereby a putative father is given the opportunity to establish his factual or legal identity as a child's father, and thus shift his status from putative father to that of a natural or legal parent. These statutes abrogate, in part, the common law presumption of *Jolly. See State v. Green,* 124 N.C. App. 269, 477 S.E.2d 182 (1996), *aff'd,* 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied,* 525 U.S. 1111, 142 L. Ed. 2d 783, 119 S. Ct. 883 (1999) (when General Assembly enacts legislation addressing a subject, the statute supplants common law in regard to that matter). Summarized, these statutes are:

> 1. N.C.G.S. § 49-10 establishes procedures for the putative father to legitimate his illegitimate child. The mother and child are "necessary parties to the proceeding," which allows legitimation when "it appears to the court that the petitioner is the father of the child[.]" N.C. Gen. Stat. § 49-10 (1999).
>
> 2. N.C.G.S. § 49-12 provides for automatic legitimation of a child upon the marriage of the putative father to the illegitimate child's mother. N.C. Gen. Stat. § 49-12 (1999).
>
> 3. N.C.G.S. § 49-12.1 sets out the procedure for legitimation of a child whose mother is married to someone other than the putative father. The putative father may overcome the presumption of legitimacy arising from the mother's marriage by "clear and convincing evidence." N.C. Gen. Stat. § 49-12.1 (1999).
>
> 4. N.C.G.S. § 49-14 provides for a civil action to establish the paternity of an illegitimate child upon "clear, cogent, and convincing evidence." N.C. Gen. Stat. § 49-14 (1999).

Upon compliance with provisions of any of the above statutes, the putative father of an illegitimate child achieves a legal status equal to that of the child's mother:

> 1. N.C.G.S. § 49-11 states that upon legitimation, the father has "all of the lawful parental privileges and rights, . . . to the same extent as if said child had been born in wedlock[.]" N.C. Gen. Stat. § 49-11 (1999).
>
> 2. N.C.G.S. § 49-15 provides that, "*after* [a judicial] *establishment of paternity* of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same[.]" N.C. Gen. Stat. § 49-15 (1999) (emphasis added).

Therefore, after the putative father legitimates his child according to statutory provision, or submits to a judicial determination of paternity, the child's parents stand on an equal footing as regards to custody. *See Conley v. Johnson,* 24 N.C. App. 122, 210 S.E.2d 88 (1974) (upholding award of visitation rights to the father of an illegitimate child, following judicial determination that he was child's father; Court notes abrogation of common law by compliance with N.C.G.S. § 49-14).

As to whether plaintiff has taken the necessary steps to legitimate Kayla, this Court has identified several procedures by which a biological father may legitimate his child: (1) through a verified petition filed with the superior court seeking to have the child declared legitimate, (2) by subsequent marriage to the mother, or (3) through a civil action to establish paternity filed pursuant to N.C. Gen. Stat. § 49-14. *Helms v. Young-Woodard,* 104 N.C. App. 746, 749-50, 411 S.E.2d 184, 756 (1991), *disc. review denied,*

331 N.C. 117, 414 S.E.2d 756, *cert. denied,* 506 U.S. 829, 121 L. Ed. 2d 53, 113 S. Ct. 91 (1992); *see also* N.C. Gen. Stat. §§ 49-10 through 49-17 (1999).

In this case, the record shows that plaintiff filed a "Father's Acknowledgment of Paternity" under N.C. Gen. Stat. § 110-132, by which he acknowledged his paternity of Kayla. In addition, plaintiff agreed to provide support, and an order of paternity was approved which states that it "shall have the same force and effect as a judgment of paternity entered by this Court pursuant to Chapter 110[.]" However, plaintiff has not taken any of the steps outlined in *Helms* to legitimate Kayla. The parties concede that plaintiff neither legitimated Kayla as provided by statute, nor did he seek a judicial determination of paternity under N.C.G.S. § 49-14.

We are aware of recent statutory and case law dealing with the constitutionally protected right of a biological parent to the care and custody of his or her child. For example, since *Jolly,* the United States Supreme Court has acknowledged on several occasions that due process and equal protection mandate that a biological parent may not be denied the companionship, custody and control of a child absent a showing of unfitness. *See Stanley,* 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (holding that in a dependency proceeding following the death of an illegitimate child's natural mother, due process requires that the unwed father be given a hearing on his fitness as a parent before the child can be taken from him); *Lehr v. Robertson,* 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983) (holding that where an unwed father has failed to developed a significant custodial, personal or financial relationship with his child, due process does not entitle him to notice of the child's adoption proceedings).

Similarly, our Supreme Court has held that unless a trial court finds that a parent is unfit, has neglected the welfare of the child, or has exhibited other conduct inconsistent with the parent's constitutionally protected status, the parent's paramount right to custody, care, and control of the child must prevail. *Petersen v. Rogers,* 337 N.C. 397, 445 S.E.2d 901 (1994). *See also, Price v. Howard,* 346 N.C. 68, 484 S.E.2d 528 (1997).

In addition, since *Jolly,* our General Assembly has enacted statutory safeguards for biological parents and illegitimate children. Indeed, the *Jolly* court specifically noted that under the laws then existing, a child would not have been entitled to inherit from his father or his father's relatives and that the father's consent would not have been required for adoption. *Jolly,* 264 N.C. at 715, 142 S.E.2d at 595-96. However, under current intestacy laws, Kayla would be entitled to inherit from and through plaintiff, and plaintiff would be entitled to inherit from and through her, in that plaintiff acknowledged himself to be Kayla's father pursuant to N.C. Gen. Stat. § 29-19(b)(2) (1999). Plaintiff's consent would also now be required for her adoption. *See* N.C. Gen. Stat. § 48-3-601 (1999).

Likewise, other statutes acknowledge the constitutionally protected rights afforded to a biological father who has acknowledged paternity but may not have legitimated his child. *See e.g.,* N.C. Gen. Stat. § 7B-1111 (1999) (grounds for termination of parental rights); N.C. Gen. Stat. § 101-2 (1999) (consent required for change in name). Further, North Carolina law now provides illegitimate children, upon an acknowledgment of paternity, with benefits which had previously been unavailable. *See e.g.,* N.C. Gen. Stat. § 31-5.5 (1999) (requiring after-identified illegitimate children to be treated the same as after-born

and after-adopted children in testamentary disposition under a will); N.C. Gen. Stat. § 97-2(12) (1999) (including "acknowledged illegitimate child" within the definition of "child" under the Workers' Compensation Act); N.C. Gen. Stat. §§ 143-166.1 through .7 (recognizing acknowledged illegitimate child's right to death benefits provided to state law enforcement officers, firemen and rescue squad workers).

In this case, the record shows that plaintiff has acknowledged paternity pursuant to N.C.G.S. § 110-132 and has held Kayla out as his child. Upon confirmation of his acknowledgment, plaintiff began providing Kayla with financial support and has had overnight visits in Oklahoma and North Carolina where he and his wife have developed a "close bond" with her. However, these actions did not dissolve the presumption in favor of defendant.

There are significant differences between the procedures outlined in N.C.G.S. § 110-132 for acknowledgment of paternity in an agreement to provide child support and those governing the legitimation of a child. N.C.G.S. § 110-132 specifically governs child support, rather than child welfare and custody generally. One of the "express purposes of Article 9 of Chapter 110 of the General Statutes is 'to provide for . . . support[.]'" *Durham County Dept. of Social Services v. Williams,* 52 N.C. App. 112, 115, 277 S.E.2d 865, 867 (1981) (quoting N.C. Gen. Stat. § 110-128 (1999)). However, "'the entire thrust of a civil action under G.S. 49-14 is the determination of whether or not the defendant is the natural father of the illegitimate child in question.'" *King v. King,* 144 N.C. App. 391, 395, 547 S.E.2d 846, 849 (2001) (quoting *Carrington v. Townes,* 306 N.C. 333, 336, 293 S.E.2d 95, 98 (1982)). Therefore, as to custody, N.C.G.S. §§ 49-14 and 49-15, which explicitly

address the determination of paternity and its effect on custody issues, should prevail over general provisions of Chapter 110 acknowledging paternity for child support purposes.

Secondly, N.C.G.S. § 49-14 requires paternity to be established by "clear, cogent, and convincing evidence[,]" necessarily requiring judicial evaluation of the record evidence. N.C.G.S. § 49-14(b); *Brown v. Smith,* 137 N.C. App. 160, 526 S.E.2d 686 (2000) (mother's testimony that putative father was her only sexual partner, coupled with child's resemblance to putative father, held sufficient to allow court to determine paternity); *Nash County Dept. of Social Services v. Beamon,* 126 N.C. App. 536, 485 S.E.2d 851, *disc. review denied,* 347 N.C. 268, 493 S.E.2d 655 (1997) (court's determination that defendant was *not* the child's father upheld where supported by defendant's testimony denying paternity, notwithstanding introduction of blood test evidence showing a 99.96 percent probability that defendant was the father). In contrast, an order of paternity may be issued pursuant to N.C.G.S. § 110-132 upon the execution of affidavits, with no requirement of judicial evaluation of the evidence, or standard for the court to apply.

Thirdly, N.C.G.S. § 110-132 explicitly provides for possibility of recision, and the statutory language limits the *res judicata* effect of an acknowledgment of paternity under N.C.G.S. § 110-132 to child support actions. N.C.G.S. § 110-132(a) (1999) (acknowledgment of paternity "shall have the same legal effect as a judgment of paternity *for the purpose of . . . child support*[.]") (emphasis added). However, the putative father may bring a later challenge to the underlying question of paternity. *Leach v. Alford,* 63 N.C. App. 118, 124, 304 S.E.2d 265, 269 (1983)

(*res judicata* language in N.C.G.S. § 110-132 "applies to child support proceedings," and does not bar relief "from the underlying acknowledgment (judgment) of paternity").

There is no statutory authority for legitimation, or for equal status regarding child custody, under Chapter 110. Nor is there statutory support for any change in a putative father's status based upon his general indication of interest in or affection for the child. We apply to this issue the canon of statutory construction "embodied in the maxim, *expressio unius est exclusio alterius,* meaning the expression of one thing is the exclusion of another[.]" *Dickens v. Puryear,* 302 N.C. 437, 444 n.8, 276 S.E.2d 325, 330 n.8 (1981) (where subject tort not included in statutory list of actions governed by one-year statute of limitations, the exclusion is considered intentional). We therefore conclude that the General Assembly, by specifying certain procedures to confer parental status upon the putative father of an illegitimate child, necessarily excluded other procedures. For this reason, we conclude that plaintiff's execution of documents pursuant to the child support provisions of Chapter 110 of the N.C. General Statutes did not erase the common law presumption in favor of defendant.

In North Carolina, "all such parts of the common law . . . which [have] not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are . . . in full force within this State." N.C. Gen. Stat. § 4-1 (1999). Morever, while the North Carolina Supreme Court "possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason[,]" *State v. Freeman,* 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) (citations omitted), this Court does not possess such authority. We are mindful of the actions taken by plaintiff in this case in regard to his parental

role. However, as stated above, the limits of this Court's authority require that a plaintiff's "equitable challenge must yield to our judicial stricture to follow the statutory law, not make it." *In re Adoption of Byrd,* 137 N.C. App. 623, 628, 529 S.E.2d 465, 469 (2000), *aff'd,* 354 N.C. 188, 552 S.E.2d 142 (2001).

The common law rule remains in effect until altered by enactment of the General Assembly or ruling of the North Carolina Supreme Court. Based upon the facts of this case, the trial court incorrectly applied the "best interest of the child" analysis and should have applied the common law presumption set forth in *Jolly,* 264 N.C. 711, 142 S.E.2d 592. The decision of the trial court is reversed and the matter is remanded for a new hearing applying the common law presumption in favor of defendant.

Reversed and remanded.

Judge BIGGS concurs.

Judge WALKER concurs in part and dissents in part with a separate opinion.

CONCUR BY:

WALKER (In Part)

DISSENT BY:

WALKER (In Part)

DISSENT:

WALKER, Judge, concurring in part and dissenting in part.

I concur with the majority's conclusion that the trial court properly determined that it was without jurisdiction

to grant defendant's motion for a protective order. However, for the following reasons, I respectfully dissent from that portion of the majority's opinion which holds the trial court applied an improper legal standard in determining who should have custody of Kayla.

I.

As the majority correctly points out, N.C. Gen. Stat. § 4-1 mandates that "all such parts of the common law . . . which [have] not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete are . . . in full force within this State." N.C. Gen. Stat. § 4-1 (2001). However, in my opinion, the cumulative impact of the decisions handed down by the United States Supreme Court and our own Supreme Court, along with the laws enacted by our legislature since *Jolly v. Queen,* 264 N.C. 711, 142 S.E.2d 592 (1965), has been the abrogation of the common law principle that as between the mother and the father of an illegitimate child, the mother is presumed to have a superior right to custody.

In addition to the extensive case and statutory law cited in the majority opinion, I feel that our legislature has acknowledged such an abrogation in N.C. Gen. Stat. § 50-13.2. In a custody proceeding arising pursuant to N.C. Gen. Stat. §§ 50-13.1 *et seq. as "between the mother and father, whether natural or adoptive, no presumption shall apply* as to who will better promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2001) (emphasis added). This Court has consistently observed that §§ 50-13.1 *et seq. were enacted in 1967 to "eliminate the conflicting and inconsistent statutes, which have caused pitfalls for litigants, and to bring all of the statutes*

relating to child custody and support together into one act." In re Holt, 1 N.C. App. 108, 111, 160 S.E.2d 90, 93 (1968); *see also In re King,* 3 N.C. App. 466, 165 S.E.2d 60 (1969); *and Johnson v. Johnson,* 14 N.C. App. 378, 188 S.E.2d 711 (1972). "Had the Legislature intended G.S. 50-13.1 to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided, as it did in the prior statutes G.S. 50-13 and G.S. 50-16. The mere fact that G.S. 50-13.1 is found in the Chapter of the General Statutes governing Divorce and Alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce." *Oxendine v. Catawba County Dept. of Social Services,* 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981). Furthermore, this Court, in *Conley v. Johnson,* 24 N.C. App. 122, 210 S.E.2d 88 (1974), specifically recognized the abrogation of the common law principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother. *Conley,* 24 N.C. App. at 123, 210 S.E.2d at 89.

Therefore, my review of the statutory and case law since *Jolly* leads me to conclude that any presumption of a superior right to custody afforded to the mother of an illegitimate child can only arise today upon a showing that the father has failed to accept the responsibilities associated with parenthood such that he is no longer entitled to the constitutional and statutory safeguards provided to a parent. Absent this showing, the trial court must confine itself to a determination of what is in the best interest of the child. *See Adams v. Tessener,* 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) (observing that in custody proceedings between biological or adoptive parents, or between two parties who are not natural parents, the trial court

must determine custody based on the "best interest of the child" test).

The fact that plaintiff has failed to file the documents necessary to "legitimate" Kayla should be only one factor to consider in whether he has assumed the responsibilities of parenthood. To establish such a prerequisite for the enjoyment of constitutional protections simply raises form over substance and relegates plaintiff to the status of a third party despite the absence of any dispute concerning his paternity of Kayla. Indeed, on remand plaintiff would be well advised to seek leave of the trial court so that he might file a legitimation petition pursuant to N.C. Gen. Stat. § 49-10. Presumably, defendant would not contest paternity and the parties, as the majority's opinion suggests, would then be on equal footing with respect to Kayla's custody.

The record clearly shows plaintiff has not relinquished his parental rights and the obligations required thereunder. Accordingly, I conclude the trial court correctly applied the "best interest of the child" test.

II.

Defendant also maintained that the trial court abused its discretion in awarding "primary legal custody" of Kayla to plaintiff. Our appellate courts have consistently held that where competent evidence exists to support a trial court's findings, a custody order supported by such findings will not be disturbed on appeal absent an abuse of discretion. *Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E.2d 324 (1967); *Church v. Church,* 119 N.C. App. 436, 458 S.E.2d 732 (1995); *Green v. Green,* 54 N.C. App. 571, 284

S.E.2d 171 (1981). This is so because by seeing and hearing the parties first hand, the trial court is better positioned to "detect tenors, tones, and flavors" which are absent in a cold, impersonal record. *Newsome v. Newsome,* 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Nonetheless, "when the [trial] court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby,* 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967); *see also Green,* 54 N.C. App. at 573, 284 S.E.2d at 173.

This Court has vacated custody orders where the findings consisted of merely conclusory statements, ignored critical issues or were otherwise deficient such that we were unable to determine whether the custody award was in the best interest of the child. *See e.g. Cantrell v. Wishon,* 141 N.C. App. 340, 540 S.E.2d 804 (2000); *Hunt v. Hunt,* 112 N.C. App. 722, 436 S.E.2d 856 (1993); *Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984); *Montgomery v. Montgomery,* 32 N.C. App. 154, 231 S.E.2d 26 (1977); and *Austin v. Austin,* 12 N.C. App. 286, 183 S.E.2d 420 (1971). As this Court has aptly stated, the "evidence must bolster the trial court's findings, the findings must support the conclusions, and the conclusions must support the judgment." *Green,* 54 N.C. App. at 575, 284 S.E.2d at 174.

In conducting my review of the custody order, I elect to review the following findings:

> 6. That in December, 1995, the Plaintiff moved to Oklahoma. When the child was born, the Plaintiff requested a paternity test and he voluntarily supported the child upon receiving a

> confirmation that he was the biological father of the child.

There is no competent evidence to support a finding that when Kayla was born, plaintiff requested a paternity test. Rather, the evidence clearly points to plaintiff as having agreed to submit to a paternity test at the behest of the Wake County Child Support Agency. It was only after the test that plaintiff acknowledged paternity.

The trial court also found:

> 8. That the Defendant's ex-boyfriend, Clea Johnson, who is father to the two (2) other minor children, has a relationship with the minor child, Kayla. The child has called him "daddy Clea" and that relationship has led to the confusion of the child.
>
> 9. That the defendant is presently involved with Moheeb Oona and this relationship has led to the confusion of the minor child.

These findings conclude that defendant's relationships with other men have led to "the confusion" of Kayla. However, neither finding explains how Kayla is "confused" or details the impact these relationships have had on Kayla's welfare.

With respect to Kayla's care, the trial court found:

> 14. That the Defendant's mother and grandmother get the child ready for school in the mornings, pick her [up] from daycare, feed her dinner, bathe her and put her to bed on a regular basis.
>
> . . . 19. That the minor child is enrolled at Ernest Myatt daycare center and has been so enrolled since she was two (2) years old. From her

> birth until age two (2), the minor child was cared for by the Defendant's grandmother.

While there is competent evidence to support a finding that defendant's mother and grandmother have played a role in Kayla's care, the evidence does not indicate, as these findings suggest, that defendant's mother and grandmother have played such a dominant role to the exclusion of defendant. The findings also fail to consider defendant's status as a single mother and the impact of her having received support payments from plaintiff in amounts less than what would have been required under our State's child support guidelines. Rather, the findings only state:

> 22. That the Plaintiff paid voluntary child support to the Defendant upon the determination of paternity and there was no Order for Child Support entered. The parties agreed upon an amount of support and it was paid regularly and consistently by the Plaintiff.

The trial court next addressed defendant's being away from Kayla and found:

> 30. That the Defendant is not with the minor child a lot but rather she is at work or out with friends. The Defendant does go out 2-3 times per month on the weekends and the minor child is with the Defendant's mother.

This statement is merely a conclusion concerning defendant's lifestyle without relating how, if at all, Kayla's best interest or welfare has been adversely affected.

The trial court does make specific reference to Kayla's behavioral development in the following findings:

> 27. That the minor child, Kayla, is a happy, lively child but she does have some problems. While at the daycare, the child was hitting, biting, scratching other children. These behaviors are not unusual in and of themselves, however, what is unusual is that the daycare contacted Project Enlightenment to monitor the child's progress.
>
> 28. That after the evaluation was conducted by Project Enlightenment, the Defendant did not follow through with informing herself about the results and she believed that the child was just going through a phase. The needs of the child were underestimated by the Defendant.

However, the evidence in the record shows that after further consultations with Kayla's teachers, the Project Enlightenment consultant noted that her behavior had improved and closed the case. Moreover, the findings fail to identify the "needs" of Kayla, which were "underestimated" by defendant.

In some instances, the trial court alludes to defendant having failed to meet Kayla's "needs." For example, the trial court found:

> 29. That the minor child needs more attention than she is getting from the Defendant. The minor child needs more structure than she is getting from the Defendant. The Defendant does not offer the minor child a stable and consistent environment.
>
> . . . 32. That the Defendant's social life and work schedule has led to a hectic household which does not meet the needs of the child for stability and consistency.

Yet, these findings likewise do not detail what Kayla's "needs" are or how they have not specifically been met by defendant.

Thus, I conclude that these specific findings demonstrate that the trial court has failed to find facts so that this Court may satisfactorily determine whether its order awarding primary custody to plaintiff is adequately supported by competent evidence. Therefore, although I conclude the trial court applied the proper legal standard, I would vacate the custody order and remand the case to the trial court for more detailed findings.

IN THE SUPREME COURT OF NORTH CAROLINA

322A02 (Daniel Rosero v Lisa Blake) Wake

DANIEL FABRICIO ROSERO

v

LISA BLAKE

NC Court of Appeals (COA01-350) (COA01-483)
Wake (00CVD3146)

JUDGMENT

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is error in the record and proceedings of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Edward T. Brady, Associate Justice, be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Reversed.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of One-hundred eighty-nine and 50/100 dollars ($189.50), and execution issue therefor.

Certified to the North Carolina Court of Appeals, this the 3rd day of July 2003.

A TRUE COPY CHRISTIE SPEIR CAMERON
[SEAL] Clerk, Supreme Court of North Carolina

By: /s/ Carol B. [Illegible]
Assistant Clerk

RELEVANT NORTH CAROLINA STATUTES

§ 4-1. Common law declared to be in force

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

HISTORY: 1715, c. 5, ss. 2, 3, P.R.; 1778, c. 133, P.R.; R.C., c. 22; Code, s. 641; Rev., s. 932; C.S., s. 970.

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§ 49-10. Legitimation

The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall

be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index.

HISTORY: Code, s. 39; Rev., s. 263; C.S., s. 277; 1947, c. 663, s. 1; 1971, c. 154; 1977, c. 83, s.

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§ 49-11. Effects of legitimation

The effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.

HISTORY: Code, s. 40; Rev., s. 264; C.S., s. 278; 1955, c. 540, s. 2; 1959, c. 879, s. 10; 1963, c. 1131.

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§ 49-12. Legitimation by subsequent marriage

When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be

entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.

HISTORY: 1917, c. 219, s. 1; C.S., s. 279; 1947, c. 663, s. 2; 1955, c. 540, s. 3; 1959, c. 879, s. 11.

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§ 49-14. Civil action to establish paternity

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;

(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or

(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(f) When a determination of paternity is pending in a IV-D case, the court shall enter a temporary order for child support upon motion and showing of clear, cogent, and convincing evidence of paternity. For purposes of this subsection, the results of blood or genetic tests shall constitute clear, cogent, and convincing evidence of paternity if the tests show that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher. If paternity is not thereafter established, then the putative father shall be reimbursed the full amount of temporary support paid under the order.

(g) Invoices for services rendered for pregnancy, childbirth, and blood or genetic testing are admissible as

evidence without requiring third party foundation testimony and shall constitute prima facie evidence of the amounts incurred for the services or for testing on behalf of the child.

HISTORY: 1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2; 1997-154, s. 1; 1997-433, ss. 4.2, 4.10; 1998-17, s. 1.

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§ 49-15. Custody and support of illegitimate children when paternity established

Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child.

HISTORY: 1967, c. 993, s. 1.